



No. 82-1839

IN THE

Supreme Court of the United States

October Term, 1983

ZELVERN W. MANN, Administrator of the Estate of ADA
CREWS MANN, Deceased,

Petitioner,

vs.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARL-
SON, M.D., BERNARD STROHM, Administrator, UCLA
HOSPITAL & CLINICS, ANDREA CRACCHIOLO, III, M.D.,
STANLEY CASSAN, M.D.,

Respondents,

DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individ-
ually, DAVID H. CANTER, sole corporation, LISA CARL,
sole corporation, HARRINGTON, FOXX, DUBROW & CAN-
TER, a legal partnership; JOSEPH A. WAPNER, DAVID N.
EAGLESON, Judge, JOHN COLE, Judge, PETER S. SMITH,
Judge,

Respondents.

CONSOLIDATED FOR HEARING.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DALE B. GOLDFARB,
MARK W. FLORY,
HARRINGTON, FOXX, DUBROW
& CANTER,
One Wilshire Bldg.,
Suite 703,
Los Angeles, Calif. 90017,

*Attorneys for Respondents,
Richard Gold, M.D., et al.,
(The non-judicial Respondents).*

Questions Presented.

Mann v. Gold

1. Whether petitioner's effort to relitigate a state court medical malpractice action in the guise of a federal civil rights claim, dismissed by the district court as affirmed by a unanimous Ninth Circuit decision following this Court's holding in *Polk County v. Dodson*, 454 U.S. 312 (1981), merits extraordinary discretionary review by this Court?

2. Whether physicians and a hospital administrator acted under color of state law when rendering medical services to a private patient in a non-custodial hospital merely because they were employed by a state-operated facility?

3. Whether a district court which awards attorney's fees to defendants pursuant to 42 USC § 1988 is required by *Hughes v. Rowe*, 449 U.S. 5 (1980) and *Cohn v. Papke*, 655 F.2d 191 (9th Cir., 1981) to issue express findings of fact and conclusions of law when dismissing a transparently obvious attempt to relitigate a state court medical malpractice action in the guise of a federal civil rights claim?

Mann v. Canter

4. Whether the substantial and uncontroverted evidence submitted in support of respondents' motion for summary judgment, which conclusively negated all of petitioner's allegations of improper conduct, justified the district court's grant of summary judgment?

5. Whether the district court's refusal to continue the hearing of a summary judgment motion for the purpose of permitting petitioner to conduct depositions, when there was no showing of how the depositions sought could have yielded any admissible evidence which would have contradicted the specific denials of respondents, amounted to an abuse of the court's discretion under Rule 56(f) of the Federal Rules of Civil Procedure?

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Judge.

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**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

Statement of the Case.

The present petition represents only the most recent act in a truly bizarre legal melodrama which began as a medical malpractice action instituted by petitioner and his attorney sons in the Los Angeles Superior Court in March of 1979, following the death of Ada Mann.

In *Mann v. Cracchiolo*, Los Angeles Superior Court Case No. NWC 76789, petitioner and his three sons, two of whom acted as attorneys of record for all plaintiffs, charged the Regents of the University of California, the UCLA Medical Center, fifty-four staff physicians, a radiology technician, the associate director/administrator of the hospital, and the hospital's data processing manager and finance director with (1) breaking the decedent's neck; (2) conspiring to conceal the existence of that broken neck; (3) keeping decedent alive in order to receive Medicare and Medi-Cal funds by intentionally performing useless operations upon her; and (4) then attempting to kill her in order to (a) conceal their complicity in causing and concealing the existence of the broken neck; and (b) assure that her death certificate would be signed without reference to a broken neck.¹

During the course of the pretrial proceeding, plaintiffs attempted to disqualify a total of six superior court judges on the grounds that the judges were personally prejudiced against them, and filed eight petitions for extraordinary relief with the California Court of Appeal. When all else failed, plaintiffs filed the first of the consolidated actions

¹In order to provide this Court some feeling for the nature and extent of the litigation between these parties, respondents have annexed hereto as an Appendix the unpublished opinion of the California Court of Appeal in *Mann v. Cracchiolo*, 2nd Civ. No. 66613, filed August 30, 1983, wherein the Court affirmed the superior court's grant of summary judgment to all defendants. The allegations of plaintiffs' first amended complaint are summarized at pages 4-6.

It should be noted that plaintiffs' petition for rehearing in 2nd Civ. No. 66613 is pending.

which are the subject of this petition, *Mann v. Canter*, wherein they contended that the law firm representing the defendants in the state court action, three individual defense counsel, four superior court judges and the retired superior court judge sitting as special master on discovery matters conspired together to deprive plaintiffs of their rights under the United States Constitution. After serving the district court lawsuit, plaintiffs contended that all named defendants were disqualified from any other participation in the state case.

The outlandish proceedings in the state trial court² were brought to a merciful conclusion on October 15, 1981, when the superior court granted defendants' motions for summary judgment. In granting the motions, the court relied on the declarations of expert witnesses establishing that the decedent did not break her neck on the date alleged by plaintiffs and that, moreover, the treatment rendered by defendant doctors conformed to the applicable standards of practice in the community. In addition, the court relied upon declarations by the individual defendants to the effect that their conduct conformed to the applicable standard of practice in the community and that they did not conspire to conceal the existence of a fracture of the decedent's neck, or to kill her, and upon deposition testimony by one of plaintiffs' own

²It is only with the exercise of considerable restraint that respondents resist the temptation to place before this Court substantial portions of the state court record, which is replete with episodes typified by one plaintiff attorney's reference to various defense attorneys, on the record in deposition, as "some kind of imbecile", "sarcastic bitch", and "jazz boy", respectively; by the other attorney for plaintiff referring to a defense attorney, on the record, as a "son of a bitch"; by plaintiffs' counsel telling the retired superior court judge acting as court-appointed special master at deposition to "shut up"; and culminating with the presiding judge of the Los Angeles Superior Court, at the request of the special master, ordering that all depositions be held in court with bailiffs present.

expert witnesses that, in his opinion, the decedent did not fracture her neck on the date asserted by plaintiffs. (Appendix, pp. 8-12.)

Literally days after summary judgment was granted in superior court, plaintiffs filed the second district court action, *Mann v. Gold*, a virtual twin to their state medical malpractice action thinly disguised as a civil rights case, wherein they named five of the defendants to the state court action. Naturally, plaintiffs simultaneously continued to pursue their appellate remedies in state court, as well as their companion "civil rights" case against the attorneys and judges.

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In the *Gold* action, plaintiff contended that defendant physicians and hospital administrator negligently treated decedent, causing her wrongful death, and further alleged that, in their capacity as state agents by virtue of their employment with UCLA Medical Center, defendants conspired to subject decedent to cruel and unusual punishment and to deprive her of her right to be heard. Defendants moved for dismissal pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. (Petition, Appendix A, p. 36.)

Finding no action "under color of state law", the district court granted the motions, and also granted defendants' motion for attorney's fees pursuant to 42 U.S.C. § 1988. (Petition, Appendix A, pp. 36-37.) The Court of Appeals for the Ninth Circuit affirmed.

Mann v. Canter

In the *Canter* action, plaintiff alleged that four state court judges, the retired judge acting as a discovery referee, three individual attorneys and the law firm representing the de-

endants in the state medical malpractice action conspired to ruin the state court action. (Petition, Appendix A, p. 39.)

The judicial defendants obtained dismissals on the basis of judicial immunity.

The attorney defendants, respondents here, moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, relying on affidavits specifically denying all of the conduct alleged by plaintiff. The district court concluded that the insufficient, incompetent and inadmissible material submitted by plaintiff in opposition raised no triable issue of fact, and so granted summary judgment and a dismissal. (Petition, Appendix A, pp. 39-40A.)

The Ninth Circuit affirmed, and, concluding that the appeal was frivolous, awarded these respondents damages and double costs pursuant to Rule 38 of the Federal Rules of Appellate Procedure. (Petition, Appendix A, p. 40B.)

REASONS FOR DENYING THE WRIT.

Petitioner's effort in these consolidated cases to both re-litigate his state court medical malpractice action and to "punish" the judges and attorneys he perceives as responsible for his defeat was so obviously lacking in merit as to move the district court, in one instance, and the Ninth Circuit, in the other, to award these respondents the costs and fees they expended in defending themselves.

The present petition, replete with half-truths and distortions of law and fact, is equally unmeritorious, and demonstrates neither conflict between the courts nor important unsettled issue that warrants review by this Court.

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1. Plaintiff failed to establish activity under color of state law.

The United States Supreme Court has given a specific definition to the phrase "under color of" in *Monroe v. Pape*, 365 U.S. 167 (1961):

"Misuse of power, possessed by virtue of state law and made possible *only* because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law."

(Emphasis added.)

No reported decision has ever held that, in a noncustodial context such as that presented by this case, a violation of federal civil rights arose from wrongful conduct of treating physicians or administrators at a hospital that happened to be state operated. The reason is obvious: a treating physician's or administrator's employment by a state-operated noncustodial hospital is simply fortuitous. Neither employee is clothed with any special powers over the patient solely by virtue of such employment, and both could just as easily engage in identical wrongful conduct at a privately-owned facility.

Neither in the courts below nor in this petition has petitioner presented any authority supporting his contention that employment at a state-operated hospital cloaks physicians or administrators with the power of the state, thereby transforming their private conduct into activity "under color of" state law. In fact, petitioner has cited only cases which give compelling support to respondents' position that "color of state law" in the medical context arises only in a custodial setting. For example:

Estelle v. Gamble, 429 U.S. 97 (1976), where a state prisoner sued prison officials, including the Medical Director of the Department of Corrections, and which stated that the government has an "obligation to provide medical care for those *whom it is punishing by incarceration*." (429 U.S. at 103; Emphasis added);

Holmes v. Silver Cross Hospital of Joliet, 340 F. Supp. 125 (N.D. Ill. 1972), where a court-appointed conservator of an incompetent patient forced the patient to undergo blood transfusions which were in violation of his religious beliefs;

O'Connor v. Donaldson, 422 U.S. 563 (1975), where a mental patient was involuntarily confined in a state mental hospital for fifteen years and, during that period, was deprived of medical treatment for his condition.

Other cases relied on by petitioner do not deal at all with the issue before this Court. In *Sprecht v. Patterson*, 386 U.S. 605 (1967), the trial judge sentenced a convicted sex offender to an indeterminate term of from one day to life on the basis of a psychiatric examination and report, without giving the petitioner a right to be heard or to confront witnesses; *In Re Kemmler*, 136 U.S. 437 (1890), also relied on by petitioner, is a death penalty case. Most puzzling to

respondents is petitioner's repeated citation of *Polk County v. Dodson*, 454 U.S. 312 (1981) in support of a number of sometimes conflicting propositions. Contrary to petitioner's confusing suggestions, *Polk County* supports respondents here, in that it stands for the proposition that an employment relationship between the state and an individual is not enough to establish that the individual acts under "color of law".³

Petitioner repeatedly suggests that decedent's confinement at UCLA Medical Center was in certain respects involuntary, and so "custodial". It should be noted that even a most generous reading of petitioner's complaint fails to reveal any allegations of imprisonment, no doubt due to the fact that decedent was in and out of the hospital at various times during the period at issue. (Appendix, p. 4.)

Even if petitioner could have somehow shown that decedent was falsely imprisoned, he would still be faced with the critical threshold problem of action "under color of" state law. As this Court stated in *Paul v. Davis*, 424 U.S. 693 (1976), conduct which is tortious under state law does not turn into a violation of federal civil rights law whenever the tortfeasor fortuitously happens to be a state employee. In this case, the defendant physicians and administrator were totally without state authority to hold decedent against her wishes. Consequently, even assuming *arguendo* that they

³In addition to insisting that the opinion of the Court in *Polk County* lends support to virtually every contention he raises, petitioner suggests that the facts of *Mann v. Gold* present Justice Blackmun with an appropriate opportunity to expand upon the theory set forth in his dissenting opinion. Contrary to petitioner's suggestion, the public defender who is "acting to fulfill a state obligation" (454 U.S. at 328) and whose authority to represent his client "is possessed by virtue of the State's selection of the attorney and his official employment" (454 U.S. at 329) is easily distinguished from the physicians and administrator in *Mann v. Gold* whose authority to treat a particular patient in a non-custodial setting is derived exclusively from the patient's selection of the physician or institution.

drugged her to keep her quiet and operated on her to keep her bed-ridden until the statute of limitations ran on her fraudulently-concealed fatal injury, they did so as private physicians, not in the capacity of state agents, and could just as easily have abused decedent had they been treating her in a private hospital. In addition, at the time petitioner filed the complaint in *Mann v. Gold*, the Los Angeles Superior Court had already ruled that respondents had committed no tort under state law.

2. Contrary to petitioner's assertions, the law does not require a district court awarding attorney's fees pursuant to 42 U.S.C. § 1988 to issue formal findings of fact and conclusions of law, particularly when dealing with an obviously frivolous, unreasonable and groundless effort to relitigate an unmeritorious action.

In *Cohn v. Papke*, 655 F.2d 191 (9th Cir., 1981), the Ninth Circuit suggested, in a footnote, that a trial court deciding to grant attorney's fees in a civil rights action "should make findings of fact and conclusions of law detailing the basis for the decisions." (655 F.2d at 195, footnote 3.) Petitioner attempts, in vigorous argument, to raise this suggestion to the level of a "holding" imposing a "requirement of findings" on the courts. (Petition, p. 22.) Petitioner attempts to buttress this contention through reliance on this Court's statement in *Hughes v. Rowe*, 449 U.S. 5 (1980) that "the fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for that assessment of fees." (449 U.S. at 14.)

The present litigation presents a drastic contrast to the situations facing the courts in *Cohn* and *Hughes*. Here, as the district court knew when it issued its ruling, petitioner's purported civil rights action amounts to nothing more than an effort to relitigate an unsuccessful state medical malpractice action. As the Ninth Circuit held in affirming the

decision of the district court here, the court was well within its discretion in concluding, even in the absence of formal findings of fact or conclusions of law, that petitioner's action was "frivolous, unreasonable, or without foundation" within the meaning of *Hughes v. Rowe*. (Petition, Appendix A, p. 37.)

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3. Petitioner disingenuously argues that these respondent attorneys were dismissed from the *Canter* action because: (1) once the judicial defendants were dismissed on the basis of immunity, "the private attorneys are not considered to have acted under color of law" (Petition, p. 24); and (2) the cloak of "judicial immunity carries over to private attorneys corruptly conspiring with the judicial defendants." (Petition, p. 26.)

A cursory reading of the Ninth Circuit's decision in the *Canter* action demonstrates that, contrary to petitioner's assertions, these respondent attorneys were granted summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. These respondents conclusively negated all of petitioner's purported contentions through competent evidence, while petitioner attempted to rely on inadequate, incompetent and inadmissible matters. (Petition, Appendix A, p. 40A.)

Thus, the district court's holding that respondents "did not act under color of state law" is based, not on any jurisdictional or immunity notions, but on a broader, evidentiary finding that respondents simply did not commit the acts alleged by petitioner.

4. Finally, it is clear that the district court was well within its discretion in denying petitioner's request that the motions for summary judgment be postponed pending the conduct of certain depositions by petitioner.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit *facts essential to justify his opposition*, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” (Emphasis added.)

The Ninth Circuit could not envision how the conduct of the depositions requested by petitioner would have permitted petitioner to contradict the specific denials set forth in the affidavits submitted by respondents in support of their motions for summary judgment. (Petition, Appendix A, p. 40A.) Indeed, petitioner fails to suggest, even at this stage of the proceedings, how the discovery he requested could have negated these respondents affirmative factual showing.

The burden was on petitioner to specify some opposing evidence, which, through discovery, he could reasonably expect to adduce which would create a genuine issue of material fact. *Gifford v. Travelers Protective Association*, 153 F.2d 209, 211 (9th Cir., 1946.) He failed to carry that burden, and the district court quite properly refused to allow him to subject respondents to further expense, delay and harassment. The denial of petitioner's request was abundantly appropriate.

Conclusion.

These consolidated cases present this Court, not with a conflict between the lower courts or an unsettled issue that warrants extraordinary discretionary review, but a last-ditch effort by a disgruntled litigant and his attorney sons to locate still another forum for their personal vendetta against these

respondents. The decisions of the district court below, unanimously affirmed by the Ninth Circuit, are consistent in every respect with the rulings of this Court, with justice and with equity. They do not merit review by this Court.

Respectfully submitted,

DALE B. GOLDFARB,

MARK W. FLORY,

HARRINGTON, FOXX, DUBROW & CANTER,

Attorneys of Record for Respondents,

Richard Gold, M.D., et al.,

(The non-judicial Respondents).

APPENDIX.

NOT TO BE PUBLISHED

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Zelvern W. Mann, Administrator of the Estate of Ada Crews Mann, deceased; Kenneth Crews Mann; Gaylord Newman Mann; Bruce Ogden Mann; Zelvern W. Mann, individually as heirs,

Plaintiffs and Appellants,

v.

Andrea Cracchiolo III, M.D.; The Regents of the University of California; U.C.L.A. Hospital and Clinics; R. D. Arndt, M.D.; Douglas Bald, M.D.; Kenneth L. Baldwin, M.D.; Eugene Barnett, M.D.; Lawrence W. Bassett, M.D.; Marchall E. Bein, M.D.; Leslie Bennett, M.D.; J. L. Bernstein, M.D.; Livia G. Bohman, M.D.; Gerald Buckley, M.D.; John Carlson, M.D.; Stanley Cassan, M.D.; Sherrie Chatzkel, M.D.; Lynn W. Cooman, M.D.; Steven Croft, M.D.; D. Davidson, M.D.; Kevin Drake, M.D.; Leonard Feigenbaum, M.D.; Richard D. Ferkel, M.D.; Peter Folvary, M.D.; Sidney Friedman, M.D.; H. Gallen, M.D.; Humberto Galleno, M.D.; Steven Gausewitz, M.D.; Richard H. Gold, M.D.; Richard Gritz, M.D.; Neil Kahanowitz, M.D.; Rodney B. Kovick, M.D.; E.O. Leventen, M.D.; Norman D. Levine, M.D.; Joshua Levy, M.D.; Anthony A. Manaiso, M.D.; Marc Manger, M.D.; Rex McAlpin, M.D.; Roy Nachman, M.D.; Michael P. Norton, M.D.; Charles E. Osborn, M.D.; Graham Purcell, M.D.; Gregory Rahn, M.D.; Leo O. Rigler, M.D.; E. Rubenstein, M.D.; William Russell, M.D.; Robert L. Scanlon, M.D.; Rodney D. Schmidt, M.D.; R. Shorenstein, M.D.; Daniel H. Simmons, M.D.; Elias G. Theros, M.D.; Andre J. Van Herle, M.D.; Bruce Wannatabe, M.D.; Marvin Weiner, M.D.; J. Wright, M.D.; George K. York, M.D.; The State of California State Department of Benefit Payments aka State Department of Health Services, Beverly Myers, Director,

Defendants and Respondents.

No. 2 Civ. No. 66613. (Sup. Ct. No. NWC 76789).

Filed: August 30, 1983.

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter S. Smith, Judge, and Eli Chernow, Judge. Affirmed.

Bruce Ogden Mann and Kenneth Crews Mann for Plaintiffs and Appellants Kenneth Crews Mann, Bruce Ogden Mann, Gaylord Newman Mann, and Zelvern W. Mann, individually and as Administrator of the Estate of Ada Crews Mann, deceased.

Harrington, Foxx, Dubrow & Canter and Patty Mortl for Defendants and Respondents The Regents of the University of California and associated medical personnel.

Rushfeldt, Shelly & McCurdy and Horvitz and Greines, and Ellis J. Horvitz and S. Thomas Dodd for Defendants and Respondents Andrea Cracchiolo, III, M.D., Kenneth L. Baldwin, M.D., Graham Purcell, M.D., James Tibone, M.D., Lynn Cooman, M.D., Humberto Galleno, M.D., Edward O. Leventen, M.D., Mark Bernstein, M.D., and Richard D. Ferkel, M.D.

George Deukmejian and John K. Van de Kamp, attorneys general, Daniel J. Kremer, chief assistant attorney general-criminal division, S. Clark Moore, assistant attorney general, Anne Pressman, deputy attorney general, for Defendant and Respondent State Department of Benefit Payments aka State Department of Health Services, State of California.

NATURE OF THE CASE

On December 18, 1981, plaintiffs filed a notice of appeal from:

I. A summary judgment entered March 4, 1981, for defendant Roy Nachman, M.D.;

2. An order of July 15, 1981, granting motion of defendant Darrell Davidson, M.D., for summary judgment;

3. Summary judgment dated October 26, 1981, entered October 27, 1981, in favor of forty (40) named defendants;

4. Order after judgment made November 5, 1981, denying plaintiffs' motion for relief from default under Code of Civil Procedure section 473;

5. Order after judgment made December 18, 1981, granting costs to defendants; and

6. "If the appellate court deems the above orders to be a final termination of this lawsuit, plaintiffs hereby appeal all adverse rulings and orders made in this matter as upon entry of a final judgment of dismissal."

FACTUAL AND PROCEDURAL BACKGROUND

The underlying civil action was brought by Zelvern W. Mann as administrator of the estate of Ada Crews Mann, deceased; and by Kenneth Crews Mann, Gaylord Newman Mann, Bruce Ogden Mann, and Zelvern W. Mann, individually, as heirs of Ada Crews Mann, against the Regents of the University of California; UCLA Hospital and Clinics; 53-named individuals, most of whom were medical doctors, including Andrea Cracchiolo, III, M.D.; California State Department of Benefit Payments aka State Department of Health Services, Beverly Myers, Director, and Doe Doctors 1 through 100, Doe Nurses 101 through 200, Doe Hospital Administrative and Medical Personnel 201 through 300, inclusive, Life Insurance Company of North America, a corporation, and Does 301 through 400.

In their first amended complaint, filed September 17, 1979, plaintiffs allege eight causes of action. The fourth cause of action was for declaratory relief against the California State Department of Benefit Payments, and the sixth cause of action was against Life Insurance Company of

North America for breach of insurance contract. The fourth cause of action, against the State Department of Public Benefits Payments, etc., was severed from the main action on July 10, 1981, and is not a part of this appeal. The sixth cause of action, against Life Insurance Company of North America, is not a part of this appeal.

Some of the defendants demurred to the first amended complaint. The court sustained the demurrer as to the third, fifth, seventh, and eighth causes of action without leave to amend, leaving only the first and second causes of action against the defendants who are respondents in this appeal.

The first cause of action, for wrongful death, was brought on behalf of the heirs. It alleged that plaintiff Zelvern W. Mann was the surviving husband of Ada Crews Mann, deceased, and administrator of her estate; that plaintiffs Kenneth Crews Mann, Bruce Ogden Mann, and Gaylord Newman Mann were the sons of the decedent. Plaintiffs Kenneth Crews Mann and Bruce Ogden Mann, who are attorneys, are the attorneys for the plaintiffs.

The first cause of action, (wrongful death) alleged that the decedent was a patient at UCLA Medical Center; on November 1, 1977, decedent was taken into an X-ray room at the medical center for X rays of her feet in preparation for surgery upon her toes; at that time, decedent did not have a broken neck, but she could neither stand nor walk without physical assistance from an attendant; Dr. Andrew Cracchiolo III, a defendant, was decedent's treating physician and had her brought to the hospital for the X rays; "Defendants allowed and caused decedent to fall in the said X-ray room on November 1, 1977, and to strike the back of her head on the hard floor. This was a fall from a standing position, causing unconsciousness and breaking of her neck." Defendant Cracchiolo ordered X rays to be taken to determine whether injury had been suffered by decedent as

a result of the fall. Defendants sent the decedent home that day without telling decedent or plaintiffs that decedent had sustained a broken neck from said fall.

The complaint alleged that because of the X-ray pictures defendants knew that decedent's neck had broken as the result of the negligent handling of the decedent by the defendants which caused the decedent to fall backwards and break her neck, but that the defendants never notified the decedent nor the plaintiffs of that fact, but assured the decedent and the plaintiffs that decedent's neck had not been broken.

The first cause of action further alleged that the defendants refused to treat the decedent's broken neck; but from November 1, 1977, until the date of decedent's death, March 26, 1979, they performed numerous medical acts on decedent's body, which were irrelevant and worthless to the treatment of decedent's broken neck, which was the complete fracture of the odontoid process, that thereafter the defendants continued to take X rays from time to time of decedent's neck and head in January and September of 1978, and the decedent's broken neck was shown in the X rays. In reliance upon the statements of defendants, decedent and plaintiffs did not seek additional medical opinions concerning the possibility of serious injury to the decedent as a result of the fall but continued to rely on the defendants, who concealed from plaintiffs the fact of the fracture of the decedent's odontoid process. Plaintiffs did not learn that decedent's neck had been broken until August 1979 when the Los Angeles County Coroner certified the cause of decedent's death to be spinal cord damage due to fracture of the odontoid process of epistrotheus. The plaintiffs further alleged, on information and belief, that the defendants were attempting to kill the decedent while she was a patient at UCLA so that her death certificate could be signed without

reference to the fact of her broken neck and so as to conceal defendants' complicity in causing said broken neck and their criminal responsibility in concealing same from decedent, plaintiffs, and authorities, and to prevent an autopsy from being performed on the decedent, ". . . for an autopsy is a requirement where decedent's condition at death includes a broken neck." Plaintiffs did not discover the existence of the January 1978 and September 1978 neck and head X rays of decedent which showed the broken neck until shortly after her death on March 26, 1979, when a neurological surgeon confirmed to plaintiffs that the broken neck existed in decedent at the time of the January 11, 1978 X ray. Plaintiffs further alleged that the defendants had intentionally concealed said death-producing injury from the decedent and plaintiffs at all times.

The second cause of action, on behalf of the administrator of the decedent's estate, was captioned for "survival." It realleged by incorporation the larger portion of the first cause of action and alleged that defendant's conduct toward the deceased was willfull and intentional and "conceived in a spirit of criminal indifference" and that decedent incurred expenses before her death in unspecified sum for which damages were sought, and further asked for punitive damages in the amount of \$75 million.

On October 5, 1981, following two years of intensive and heated motion practice, discovery, and deposition taking, defendants served and filed motions for summary judgment, which were heard and granted by the court on October 15, 1981. Additional facts and procedural information will be set forth as pertinent in the discussion of this case.

CONTENTIONS

Plaintiffs' principal contentions, in summary, are that the trial court erred in granting the defendants' motion for summary judgment in that the court erred in striking and not

legally considering plaintiffs' opposition papers; that triable issues of fact would have remained to be tried if those papers had not been stricken; and that the court erred in not granting plaintiffs' post judgment motions. There are other subsidiary contentions which will be taken up in the course of the discussion.

DISCUSSION

STANDARDS FOR REVIEW OF SUMMARY JUDGMENTS

The summary judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with caution. (*Eagle Oil and Ref. Co. v. Prentice* (1942) 19 Cal.2d 553, 556.) Summary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. (Code Civ. Proc., § 437c; *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 374.)

"The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (*Lipson v. Superior Court*, *supra*, 31 Cal.3d at p. 374.) "The affidavits of the moving party are strictly construed, and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion." (*Slobjan v. Western Travelers Life Ins. Co.* (1969) 70 Cal.2d 432, at pp. 436-439. "... [I]ssue finding rather than issue determination is the pivot upon which the summary judgment law turns." (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441.)

In passing on a motion for summary judgment, the trial court must apply the above law and principles in answering these questions: (1) is there a triable issue of material fact; and if not, (2) is the moving party entitled to a judgment as a matter of law?

THE TRIAL COURT PROPERLY GRANTED
THE MOTIONS FOR SUMMARY JUDGMENT

The Defendants' Motion Papers

The motions for summary judgment of the defendant physicians, most of whom were radiologists, and of Holly Hoberg, a radiology technician, heard and ruled upon on October 15, 1981, were supported by the declarations of the moving parties, the declaration of D. M. Forrester, M.D., and portions of the deposition of George Campion, M.D.

In addition:

The motion of defendant Richard D. Ferkel, M.D., a general surgeon, was also supported by the declaration of Ronald W. Busuttil, M.D., board certified in general surgery; the motions of defendants Baldwin, Mark Bernstein, Cooman, Cracchiolo, Galleno, Levensen, Purcell and Tibone, all orthopedic surgeons, were also supported by the declaration of Leonard Marmor, M.D., a board certified orthopedic surgeon; and the motions of defendants Barnett, Carlson, Cassan, Croft, Levy, Kovick, MacAlpin, Simmons, and Van Herle, whose specialties were rheumatology, internal medicine, respiratory care, cardiology, pulmonary diseases, and endocrinology, were also supported by the declaration of Matthew O. Locks, M.D., who is board certified in internal medicine.

The declarations of the doctor defendants categorically denied the charging allegations of the complaint and declared, inter alia, their specific involvements in the case of Ada Crews Mann, that they were not in the room when she fell on November 1, 1977; that they had not at any time concealed, attempted, or conspired to conceal, any information from anyone regarding the health, care, and/or treatment of her; that services they provided for decedent were not provided for the purpose of artificially inflating her bill

or obtaining Medicare or MediCal funds; that they never attempted or conspired to kill Ada Crews Mann, and that, in their opinion, their conduct at all times conformed to the standard of practice in the community relating to the practice of their named specialty.

The declaration of Holly Hoberg, radiology technician, dated September 17, 1981, declares that her only involvement with the decedent occurred when she and decedent were in an X-ray room on November 1, 1977; that she had never concealed or attempted or conspired to conceal any information from anyone regarding the health, care, and/or treatment of decedent; and that the services she had provided to decedent were not for the purpose of inflating her bill or obtaining funds, and that she never attempted or conspired to kill decedent.

An earlier affidavit of Hoberg, dated November 21, 1980, had been filed in the court's records on December 3, 1980. It declared that her function at UCLA was to position patients so that X rays could be taken and then to take the X rays; that she had been positioning Ada Crews Mann's feet for X rays when she fell on November 1, 1977; that the allegations of the complaint that Hoberg was a party to a conspiracy to conceal medical facts and that she kept decedent in a drugged state and attempted to kill her were sham, spurious, and scandalous.

The declaration of D. M. Forrester, M.D., a board certified radiologist dated August 28, 1981, declared that she had reviewed copies of the X rays of decedent taken after her fall on November 1, 1977, and copies of many other listed X rays and of radiology reports, all of which had the name of Ada Crews Mann on them and were from UCLA and that in her opinion, all of "those reports were prepared in conformity with the standard of practice for radiologists in this community"; that she had,

“... reviewed the x-rays dated November 1, 1977. To a reasonable degree of medical certainty the November 1, 1977 x-rays do not show any fracture or dislocation. To a reasonable degree of medical certainty I do not believe the patient sustained a fracture of the odontoid process on November 1, 1977 at any time that day prior to the taking of those x-rays. Some of the reasons for my opinion are: (1) The alignment of C-1 and C-2 is normal; (2) There is no evidence of prevertebral soft tissue swelling, which normally would be present if the patient sustained a fracture of the odontoid process; (3) If the patient had recently sustained a fracture of the odontoid process she would have been in too much pain to rotate her head to the positions required for that series of x-rays.”

George Campion, M.D., is Director of Radiology at St. Joseph Medical Center, Burbank, California. Dr. Campion's deposition was taken by defendants on July 28 and August 10, 1981. In it he testified, in reference to the skull X-ray pictures of decedent Ada Crews Mann taken shortly after her fall on November 1, 1977, that “... you cannot anatomically rule it out [a fracture of the odontoid process] on radiographic method, although the fact that she can turn her neck for the positioning of the skull X rays, it is unlikely that she does have a fracture at this time,” and that, if her odontoid had been fractured on that date, “... I don't think the patient would have been able to turn her neck in order to position her head for these lateral views.” Campion also testified that he had not formulated an opinion as to whether any of doctors-defendants Arndt, Bassett, Bein, Bennett, Bernstein, Bohman, Drake, Feigenbaum, Friedman, Gold, Levine, Manger, Morton, Russell, Scanlon, Schmidt, and Weiner, had failed to comply with the standard of practice relating to radiology in relationship to decedent Ada Crews Mann but that he had never told anyone that any of those

doctors had failed to comply with the standard of practice.

The declaration of Dr. Busuttil, supporting the motion of defendant Ferkel, declared that he had reviewed the UCLA Hospital and Clinic's chart pertaining to Ada Crews Mann; and in his opinion, the care rendered to her by Richard Ferkel, M.D., conformed to the standard of practice relating to general surgeons in the community in the light of her history and symptoms.

The declaration of Leonard Marmor, M.D. supporting the motions of the orthopedic surgeons declared that he had reviewed the UCLA Hospital and Clinic's chart relating to Ada Crews Mann and copies of numerous listed X rays pertaining to her, including those of November 1, 1977; and in his opinion the care rendered to decedent by the eight orthopedic surgeons conformed to the standard of practice for orthopedic surgeons in the community in the light of her history and symptoms.

The declaration of Matthew O. Locks, M.D., supporting the motions of the remaining defendant doctors, declared that he had reviewed a copy of the UCLA Hospital and Clinic chart pertaining to Ada Crews Mann; and based upon his education, professional background, and review of the above-mentioned records, it was his opinion that the care rendered to Ada Crews Mann by each of those doctors, naming each of them, was appropriate and reasonable, in light of Ada Crews Mann's history and symptoms; that the records reflected that she had a multitude of serious medical problems, including severe rheumatoid arthritis, and that the care and treatment rendered to decedent by those doctors conformed to the standard of practice in the community of internists.

The declaration of defendant Bernard Strohm, dated September 14, 1981, established that he was the Associate

Director/Administrator at UCLA Hospital and Clinics; that he had no contact with Ada Crews Mann and was not aware that she was a patient at UCLA until after the instant lawsuit was filed; that he never concealed or attempted or conspired to conceal any information from anyone regarding the health, care, and/or treatment of Ada Crews Mann and had never attempted or conspired to kill her.

The declaration of defendant William S. Russell, dated September 12, 1981, established that he was the data processing manager at UCLA Hospital and Clinics during the relevant period of time; that he had no contact with Ada Crews Mann and was not aware that she was a patient at UCLA until after the lawsuit was filed; that he had never concealed or attempted or conspired to conceal any information concerning her health or care or medical treatment from anyone and had never attempted or conspired to kill her.

The Trial Court Did Not Err In Striking, And Not Legally Considering Plaintiffs' Papers Filed In Opposition To The Motions For Summary Judgment.

Defendants' papers in opposition to the motion were not timely filed.

On Monday, October 5, 1981, defendants served and filed eleven motions for summary judgment, or for order specifying issues as without substantial controversy, in the underlying case. The motions were noticed for hearing at 9 a.m. on Thursday, October 15, 1981.

Rule 16, subdivision B, of the Law and Motion Rules of the Los Angeles County Superior Court provides:

"B. All papers, other than those initiating the proceedings, whether in opposition or support, shall be filed directly with the court clerk in the law and discovery department in which the matter is pending at

least five calendar days but in no event later than 4:30 p.m. of the third court day preceding the scheduled hearing or they will not be considered, unless time is shortened by order of court."

Monday, October 12, 1981, was a holiday; therefore, the third court day preceding the scheduled hearing was Friday, October 9, 1981.

Plaintiffs served their opposition papers on defendants by mail on Monday, October 12, 1981. The record reflects that plaintiffs filed the court's copy with the clerk, and that the trial judge received it on Tuesday, October 13, 1981.

"The opposition papers had not been received by any of defense counsel prior to the hearing on October 15th.

At the time of the hearing of the motions, the court granted the request of defendants' counsel for a recess in order to give them an opportunity to read the court's copy of plaintiffs' opposing papers. At the conclusion of the morning arguments, just before the noon recess, plaintiffs' counsel gave defendants' counsel a copy of the opposition papers in response to their request.

After hearing argument on the motions, the court announced that plaintiffs' "... opposing affidavits will not be legally considered, they will be stricken, ..." pointing out that defendants' counsel had never received the papers. The court stated that it was relying on *Shadle v. City of Corona* (1979) 96 Cal.App.3d 173. *Shadle* holds that local court rules have the force of procedural statutes so long as they are not contrary to legislative enactments, as provided in Government Code section 68070. (*Id.* at 177.) In *Shadle*, as in the case at bench, the question of the validity of local rules became an issue in respect to the timeliness of the filing of counteraffidavits in opposition to a motion for summary judgment.

In *Shadle*, plaintiff's attorney requested leave to file counterdeclarations at the time of the hearing in spite of a local rule requiring such filing not later than three (3) court days prior to the date of hearing, as is the rule in the case at bench. The court denied the request, granted the motion, summary judgment was granted, and the judgment was affirmed on appeal. In discussing the point the reviewing court of appeal said:

"If the Legislature intended to grant parties opposing a motion for summary judgment an absolute right to file counter-affidavits at any time up to and including the time of hearing, we are confident that this policy would have been expressed in positive language. In the absence of any positive statement the presumed intent of the Legislature is that all procedural details, including filing deadlines for papers in opposition, are subject to court rule. This is all the more reasonable because of the obvious disadvantages of any system permitting last minute filing. A hearing on a motion for summary judgment cannot be satisfactorily conducted if neither the court nor the moving party is familiar with the opposing papers. At the very least, the hearing will have to be interrupted while the papers are read. The requirement that opposing papers be filed a reasonable time in advance of the hearing helps to ensure that the court and the parties will be familiar with the facts and the issues so that meaningful argument can take place and an informed decision rendered at the earliest convenient time." *Shadle v. City of Corona*, (1979) 96 Cal.App.3d 173, 178-179.

Defendants have also presented the argument that inasmuch as Dr. Fox had not been designated by plaintiffs in response to the requests of defendants for designation of expert witnesses under Code of Civil Procedure section

2037,¹ the court could not consider Dr. Fox's declaration in ruling on the summary judgment motions.

Defendants have cited no authority for that argument. As the trial court opined,

"The question . . . is an interesting one, and I don't think [it] has ever been decided under California law. Whether or not this would preclude him from filing a declaration, I don't know."

Having decided that the court properly struck the opposing papers on the grounds of untimeliness, we do not reach that question here.

Plaintiffs' Opposition Papers, Including The Declaration Of Plaintiffs' Expert, Dr. Fox, Would Not Have Been Competent Evidence On The Standard Of Care Required Of Defendant Doctors If They Had Been Timely Filed And Legally Considered In Opposition To The Motions

The papers submitted by plaintiffs in opposition to the motions for summary judgment consisted of a memorandum of points and authorities, declarations of J. DeWitt Fox, M.D., declarations of plaintiffs Kenneth Crew Mann, Bruce Ogden Mann, and Zelvern Mann and certain exhibits. Nearly all of plaintiffs' argument, in their opposition papers, was based upon the declarations of Dr. Fox.

If the opposition papers had been timely filed and legally considered, the declarations of plaintiffs Mann, all lay persons, would not have been competent to establish the standard of care required of defendant doctors in the case at bench. Plaintiffs' opposition depended entirely upon the declarations of Dr. Fox.

¹All references hereinafter are to the Code of Civil Procedure, unless otherwise specified.

Plaintiffs had sought to present Dr. Fox's declarations in order to establish that the acts of the defendant physicians did not meet the standard of care required of them and that their failure to meet that standard caused the decedent's death.

Despite the fact that the court announced that plaintiffs' opposing affidavits would "... not be legally considered, they will be stricken" the reporter's transcript reflects that the declarations of Dr. Fox had been read by the trial judge, they were read by defense counsel during a recess called for that purpose, a copy of the papers was given to and possessed by defense counsel during the noon recess, and they were alluded to frequently during arguments on and consideration of the motions. In granting the motions the trial judge stated that Dr. Fox's declarations did not set forth the requisite foundational facts to qualify him to testify about the standard of care against which the performance of the defendant doctors must be measured. The court said that there must be something in the declaration of a witness that indicates that he has some knowledge of the subject about which he is testifying. The court referred to *Brown v. Colm* (1974) 11 Cal.3d 39, 645 where our Supreme Court said:

"The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance."

We observe that Evidence Code section 720, subdivision (a) provides, in part:

"(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to which his testimony relates."

Our Supreme Court has stated the rule as to the standard of care for physicians as follows:

"The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman. And competency of an expert 'is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement.'

"The criterion in this regard is not the highest skill medical science knows; 'the law expects of physicians and surgeons in the practice of their profession only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances.' The proof of that standard is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as 'occupational experience — the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood.' He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.'" *Sinz v. Owens* (1949) 33 Cal.2d 749; see also *Landeros v. Flood* (1976) 17 Cal.3d 399, 410.

In ruling the trial judge stated that

“ . . . insofar as Dr. Fox's declaration is concerned, I think that it just does not have the requisite foundational facts in there to qualify him to testify about the standard of care.

“One does not necessarily have to be a radiologist, but if he isn't a radiologist, there has to be, although it be brief, something in there that indicates that he has some knowledge about which he is testifying. And the position of the Court today in ruling on the motion for summary judgment is not unlike that of a judge who is hearing an objection to the qualifications of an expert in trial and has to decide whether or not that person is qualified or not.”

In *Pearce v. Linde*, (1952) 113 Cal.2d 627, 629, the court held that a specialist in internal medicine, with no experience in orthopedics, was not qualified to give expert testimony in a matter involving the standard of care required in the practice of orthopedics. To the same effect see *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 477, in which it was held that a doctor with 29 years of experience as the chief autopsy surgeon in the coroner's office was not qualified to testify as an expert on the treatment of head injuries.

Plaintiffs' proposed expert, Dr. Fox, was a neurosurgeon, a neurologic surgeon. The defendant doctors in this case were radiologists (18), and other specialists in rheumatology, internal medicine, respiratory care, cardiology, pulmonary diseases, endocrinology, general surgery, and orthopedic surgery. None of them was a neurologic surgeon.

On the subject of determining the competency and qualifications of an expert witness, our Supreme Court has said:

“It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence, and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown.” *Huffman*

v. *Lindquist* (1951) 37 Cal.2d 465, 476.

We find no abuse of discretion by the trial court here in determining that plaintiffs' proposed expert, Dr. Fox, was not qualified to testify as expert on the standard of care required of defendant doctors in the case at bench, even if his declaration and the opposition papers had been timely filed and legally considered.

There Were No Triable Issues of Fact

In the absence of admissible evidence on personal knowledge by persons competent to testify to the matters stated, no triable issues of fact were raised or remain.

In their brief, plaintiffs argue at length that there were triable issues of fact remaining in this case and that, therefore, the court erred in granting defendants' motions.

We have examined plaintiffs' arguments carefully, and have searched their references to the record on appeal, and find this contention to be without merit. Substantially all of their argument is based upon the incorrect assumption that plaintiffs' papers in opposition to the motions were timely filed, were before the trial court, and were legally considered. Further, plaintiffs incorrectly assume that those papers would have been competent evidence on the standard of care required of defendants herein. Those assumptions are incorrect and have been discussed, above, in this opinion.

Lastly, plaintiffs contend that there is a triable issue of fact as to whether Ada Crews Mann fell on November 1, 1977. The issue was not whether she fell, but whether she suffered a fracture of the odontoid process on that date. That subject was fully addressed in the depositions of the individual defendants and of defendants' expert, D. M. Forrester, M. D., and in the excerpts from the deposition of George Campion, M. D., which are discussed under the heading, "The Defendants' Motion Papers," above.

Plaintiffs also contend that the motion of defendant Robert L. Scanlon, M. D., raised a triable issue of fact and should not have been granted. The contention is without merit. Dr. Scanlon's only involvement with the care of decedent was to interpret some chest X rays in October 1978, nearly one year after decedent's fall of November 1, 1977, and about five months before her death on March 26, 1979. The evidence in the declarations of Scanlan and Dr. Forrester and the deposition of Dr. Campion, that Scanlon's conduct conformed to the applicable standard of practice, are not controverted by any evidence by an expert witness.

The same is true of plaintiffs' contention that the failure of defendant doctors to have decedent examined by a neurosurgeon was conduct below the standard of practice required of defendant doctors, and that this raised a triable issue of fact. Plaintiffs base this contention on the declarations of Dr. Fox, which were not properly before the trial court and would not have been competent evidence on that standard of care if they had been before the court and legally considered.

THE COURT PROPERLY GRANTED THE MOTION OF DEFENDANT FEIGENBAUM FOR SUMMARY JUDGMENT

Plaintiffs contend that the court erred in granting the motion for summary judgment of defendant Feigenbaum on October 15, 1981, because the court had previously denied such a motion on the ground that triable issues of fact existed, and had denied a motion for reconsideration of the denial of that motion.

Feigenbaum's earlier motion had been based upon the ground that he had been named as a defendant in the action because of a mistake of fact, and that he never should have been so named. The motion was not supported by decla-

rations or depositions as to the merits of the case.

A motion for a summary judgment is a proper procedure where the question of identity of one of the parties is raised. *Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3d 237, 240.

Defendant Feigenbaum's motion of October 15, 1981, was supported by excerpts from the deposition of Dr. Campion and declarations of himself and Dr. D. M. Forrester. Feigenbaum's motion pointed out, in compliance with section 1008, that his earlier motion had been denied, as had his motion for reconsideration of that ruling. It also pointed out that at the time of the earlier rulings (December 3, 1980, and April 2, 1981) defendants did not know the identities of plaintiff's intended expert witnesses. Plaintiffs designated those witnesses on July 13, 1981, and among them was Dr. George M. Campion. Dr. Campion's deposition is discussed under the heading, "The Defendants' Motion Papers," above. It was included as one of the papers supporting defendant Feigenbaum's motion. In his deposition Campion also testified, inter alia, that he had not formulated an opinion as to whether Feigenbaum had failed to comply with the standard of practice in relationship to decedent Ada Crews Mann, but that he had never told anyone that Dr. Feigenbaum had failed to comply with the standard of practice.

Defendant's moving papers also included the declaration of D. M. Forrester, M. D., a board certified radiologist, dated August 29, 1981. The content of Dr. Forrester's declaration is discussed under the heading, "The Defendants' Motion Papers," above.

Dr. Feigenbaum's own declaration states that his only involvement in the case of decedent Ada Crews Mann "... was the interpretation of chest X-rays taken of Mrs. Mann

on September 25, 1978"; that he was not in the room when decedent fell on November 1, 1977; that

"I never at any time concealed, attempted to conceal or conspired to conceal any information from anyone, regarding the health, care, and/or treatment of Ada Crews Mann.

"In my opinion, my conduct in reading the chest X-rays of Ada Crews Mann conformed at all times to the applicable standard of practice in the community for radiologists.

"The services I provided in connection with Ada Crews Mann were not for the purpose of artificially inflating her bill or obtaining Medicare or MediCal funds. I never attempted to kill or conspired to kill Ada Crews Mann."

Plaintiffs have cited no authority for their contention that a denial of motion for summary judgment bars a later motion for a summary judgment in the same civil action, and we have found none. In *Citizens for Parental Rights v. San Mateo County Board of Education* (1975) 51 Cal.App.3d 1, 6, fn.4, cited by defendants, a motion to dismiss an amended complaint on the grounds of failure to state a cause of action as a matter of law was granted after a motion for summary judgment had previously been denied, and the judgment was affirmed. That case does not govern the question here presented, but it tends to be persuasive.

We believe that the policy inherent and expressed in section 437(c) provides the best answer to the question. That section mandates that after ruling on a motion for summary judgment, "the action shall proceed as to the issues remaining." *Conway v. Bughouse, Inc.*, (1980) 105 Cal.3d 194, 202-203, cited by plaintiffs, which, again, does not govern the question presented, is not to the contrary.

When the trial court denied Feigenbaum's earlier motion for summary judgment, his status as a defendant in the

underlying civil action was not changed; it was certainly one of "the issues remaining." When, after substantial discovery, his status and role in the case was more clearly defined, there was no reason in law or common sense why he could not again move for a summary judgment, provided he complied with the requirements of section 1008, as he did. The denial of the earlier motion for summary judgment decided none of the issues of the case, and did not bar the later motion for summary judgment which the court granted.

**THE APPEAL AS TO DEFENDANT ROY NACHMAN
MUST BE DISMISSED AS NOT TIMELY FILED**

The court granted defendant Roy Nachman's motion for summary judgment on February 11, 1981. The implementing order of the court was made on March 2, and was entered on March 4, 1981, and notice of entry of judgment was served on plaintiffs by mail on March 5, 1981. Plaintiffs' motion for new trial of that summary judgment motion and order was denied on May 1, 1981. Notice of appeal was filed December 18, 1981, more than seven months later.

California Rules of Court, rule 2, subdivision (a), requires that notice of appeal shall be filed within sixty days after the date of mailing of notice of entry of judgment; rule 3, subdivision (a), extends that time until thirty days after entry of the order denying a valid motion for new trial.

Plaintiff's appeal from the judgment entered March 4, 1981, was not timely filed and must be dismissed.

**THE ORDER GRANTING THE MOTION OF
DEFENDANT DARRELL DAVIDSON FOR
SUMMARY JUDGMENT WAS PROPERLY MADE,
BUT IS NOT AN APPEALABLE ORDER**

On July 15, 1981, the court made a minute order granting the motion for summary judgment filed by defendant Darrell Davidson. No judgment has ever been made and entered

pursuant to that order, which is not an appealable order. (Section 904.1; and see 6 Witkin, Calif. Procedure, 2d ed., 4074, Appeal, § 59).

We have reviewed the record pertaining to the motion made by defendant Davidson, the opposition thereto by plaintiffs, and the argument before the court, and it is apparent that the court properly granted the motion. Inasmuch as a judgment has not been made and entered on the order, the appeal is premature and is dismissed.

THE COURT DID NOT ERR
IN DENYING PLAINTIFFS'
POST JUDGMENT MOTIONS

The Motion Under Sections 473 and 663

Plaintiffs contend that the court erred in denying their post judgment motions for relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect, under section 473, and to set aside the judgment as being erroneous as a matter of law and inconsistent with the court's order of October 15 and 16, 1981, under section 663.

At the time this motion was made, section 663 applied to motions based upon erroneous or inconsistent findings of fact and conclusions of law, and to judgments or decrees based upon them. The present appeal is based upon a summary judgment, which does not involve findings of fact or conclusions of law. The point is without merit.

In their motion under section 473, they argue that the court erred in striking their papers in opposition to the motion as being filed untimely. That is a claim of judicial error, not of mistake, inadvertence, surprise, or excusable neglect. Judicial error is not cognizable error under section 473. Judicial error is subject to review on appeal, and section 473 was never intended as a substitute for an appeal. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892,

897, fn. 5.)

In *Carroll* the court also said

“It is well established that ‘a motion for relief under [Code of Civil Procedure] section 437 is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof the exercise of that discretion will not be disturbed on appeal.’”

“In general, a party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, in advertence, or general neglect was excusable ‘because the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief.’ (Citation.) The client’s redress for inexcusable neglect by counsel is, of course, an action for malpractice.” [Citations.] (*Id.* at pp. 897-898.)

In the case at bench, two of the plaintiffs were the attorneys for all four of the plaintiffs, and the imputation of negligence has merged and is clear.

Furthermore, we note that plaintiff made no objection to going forward with the motions at the time they were heard; that they knew of Rule 16B, which required filing all papers no later than the third court day before the hearing; that they did not ask for an order shortening time to file their opposition papers as provided under Rule 16B, nor did they request a continuance on the ground that they did not have sufficient notice.

In addition to the foregoing, we have discussed the untimeliness of the filing of the opposition papers, above.

We find plaintiffs’ contention to be without merit.

The Motion For A New Trial

Plaintiffs’ motion for a new trial was substantially a reargument of many of the grounds which they had argued before in other aspects of the case; it was old and decided

material in another context.

Plaintiffs' claim to newly discovered evidence material to their case which they could not, with reasonable diligence, have discovered and produced at the trial was an additional declaration of J. DeWitt Fox, M. D., setting forth his credentials and in effect restating the statements in his earlier declaration. In addition, he appended his curriculum vitae. All of this material was, or should have been, known to the plaintiffs before the time of the hearing of the motions for summary judgment. This contention is without merit.

IT WAS NOT ERROR FOR THE COURT
TO APPOINT A SPECIAL MASTER TO
PRESIDE OVER THE DEPOSITIONS

The record in this case discloses that the parties experienced exceptionally disruptive tactics during deposition taking. On December 7, 1979, the parties, with the approval in writing of plaintiffs' counsel Kenneth Crews Mann as to form and content, submitted to the court a proposed order appointing a special master in the proceedings. Pursuant thereto, the court, on December 7, 1979, appointed retired judge Joseph Wapner as special master for all depositions in the case at the expense of the defendants.

On March 17, 1980, the court made an order, *nunc pro tunc*, modifying and clarifying its previous order to provide that the prevailing parties would be entitled to claim as costs any sums they might expend for fees for the services of the special master.

On April 17, 1980, the court enlarged the previous order to provide that Judge Wapner would preside as special master over all discovery proceedings. The remainder of the previous order was confirmed.

On February 10, 1981, the order of April 17, 1980, was vacated, without prejudice to making an order consistent

with *Bird v. Superior Court* (1980) 112 Cal.App.3d 595, 600.

Difficulties between the parties continued, and the court made a new protective order on February 24, 1981, that retired Judge Joseph Wapner as special master should control all deposition proceedings, with the court retaining final power to review and rule upon his recommended rulings. That order was reconfirmed by order made May 1, 1981.

The relationship between the parties continued to deteriorate and became hostile to the point that on August 28, 1981, special master Wapner appeared before the Presiding Judge, in Department 1 (all parties represented) and requested, and the court made, an order that all further depositions in the case be conducted in the courthouse in the presence of bailiffs.

We judicially notice from our records that the plaintiffs filed petitions in this court of appeal for writs which would prohibit retired Judge Wapner from acting in any capacity in the case and/or to prohibit the superior court from appointing him for any purpose, as follows: No. 2 Civ. 61628, February 23, 1981; No. 63344, August 24, 1981; and No. 63649, October 1, 1981. Each of those petitions was considered and denied by this court. Our Supreme Court denied petitions for hearing in Nos. 63344 and 63649.

The court did not err in appointing a special master, nor in denying plaintiffs' motion to tax costs, nor in awarding the special master's fees as costs to defendants. Section 2019, subdivision (d), authorizes the court to limit the scope and manner of taking depositions, as provided in subdivision (b) of that section, whenever there is a showing that the examination is being conducted in such manner as unreasonably to annoy or oppress the deponent or a party. Subdivision (b)(1) authorizes the court to make any order

“ . . . which justice requires to protect the party from annoyance, . . . or oppression . . . ” and further authorizes the court “ . . . to impose upon either party . . . the requirement to pay such costs and expenses . . . as the court may deem reasonable.”

It is eminently clear that the court's orders in these matters were correct and proper.

We have noted and considered each and all of the other contentions raised by plaintiffs in their brief and have found that they would not change or have any effect upon the decision in this case and that they do not require further discussion in this opinion.

DECISION

The appeal from the judgment entered in favor of Roy Nachman is dismissed because it was not timely filed.

The appeal from the order granting summary judgment for Darrell Davidson is dismissed because that order is not an appealable order.

In all other respects the appeals from the judgment and appealable orders after judgment are affirmed. Respondents are allowed their costs on appeal.

NOT TO BE PUBLISHED.

DANIELSON, J.

We concur:

LUI, Acting P. J.

ROSS, J., pro tem.*

*Assigned by the Chairperson of the Judicial Council.